Supreme Court, U. S.
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No. 78-239

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

BERNARD CAREY, State's Attorney of Cook County, Illinois,

Appellant,

and

EUGENE F. DIAMOND, M.D.,

Appellant,

vs.

RALPH M. WYNN, M.D., JERZY JOZEF (GEORGE) BIEZENSKI, M.D.; and MARVIN ROSNER, M.D.; ALLAN G. CHARLES, M.D., YOLANDA ADLER, M.D.; and MARY ZOE, individually and on behalf of all others similarly situated,

Appellees,

and

JOHN S. LONG, M.D., on behalf of himself and all others similarly situated; ILLINOIS ABORTION SERVICES COUNCIL, an Illinois not for-profit corporation, on behalf of themselves and all others similarly situated,

Appellees.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

MOTION TO DISMISS

MERLE L. ROYCE, II
One First National Plaza
Chicago, Illinois 60603
(312) 329-5624

R. PETER CAREY
10 South LaSalle Street
Chicago, Illinois 60603
(312) 236-7080

ATTORNEYS FOR APPELLEES, WYNN, BIEZENSKI, ROSNER, CHARLES, ADLER AND ZOE

Of Counsel:

LOIS J. LIPTON
Roger Baldwin Foundation of ACLU, Inc.
5 South Wabash, Suite 1315
Chicago, Illinois 60603

JEFFREY W. FINKE
One First National Plaza
Chicago, Illinois 60603
(312) 329-5314

Midwest Law Printing Co., Chicago 60601, Financial 6-3938

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Appellees, Ralph M. Wynn, M.D., Jerzy Jozef Biezenski, M.D., Marvin Rosner, M.D., Allan G. Charles, M.D., Yolanda Adler, M.D., and Mary Zoe, pursuant to Rule 16(1)(a) and (d) of the Revised Rules of this Court, move to dismiss on the grounds that the appeal is not within the jurisdiction of this Court, because not taken in conformity to statute, and that Appellant, Eugene F. Diamond, M.D., lacks standing to raise the federal questions sought to be reviewed.

I.

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

A. The Statute

This appeal raises the question of the constitutional validity of certain provisions of the Illinois Abortion Act of 1975 (hereinafter referred to as the "Act"), Ill. Rev. Stat., Ch. 38 § 81-21 *et seq.* (1976).[1]

The Act promulgated a comprehensive penal scheme whereby abortions were regulated at all stages of pregnancy by numerous procedural and substantive restrictions. Section 2(6) of the Act established the offense of "criminal abortion." This offense was punishable under Section 11(a) of the Act as a Class 2 felony by incarceration between one and twenty years.[2] Section 3 required an elaborated written certification of the woman's consent to the abortion, which, under Section 3(2)(a) required the physician to "inform" his patient of the "competency of the fetus . . . such as, but not limited to, what the fetus looks like, fetus ability to move, swallow and its physical characteristics." The physician was also required under Section 3(2)(b) to inform his patient of the "general dangers of abortion, including, but not limited to, the possibility of subsequent sterility, premature birth, live-born fetus and other

[1] The Act is set forth in the Appendix to Appellant's Jurisdictional Statement at App. 61-67.

[2] The Illinois Abortion Act of 1975 was passed as a new provision to the Illinois Criminal Code. The Criminal Code provides a sentence of one to twenty years upon conviction of a Class 2 felony. Ill. Rev. Stat., Ch. 38 § 1005-8-1(b)(3) (1977). Eight provisions of the Act carried the sanction of a conviction as a Class 2 felony, while three provided the penalty of a Class B Misdemeanor, punishable by incarceration up to six months. Ill. Rev. Stat., Ch. 38 § 1005-8-3(a)(2) (1977).

dangers." Sections 3(3) and (4) also prohibited a physician from performing an abortion for a married woman without her spouse's written consent or for an unmarried minor without the written consent of one of her parents.

Section 5(2) of the Act prohibited the performance of a therapeutic abortion after the viability of the fetus, unless the woman's physician consulted with two "unrelated" physicians. Section 7 provided for the automatic termination of a woman's and her consenting spouse's parental rights where a live birth occurs after an "attempted," non-therapeutic abortion. A companion provision, Section 8, required a physician to "inform" only a post-viability abortion patient of this automatic termination of parental rights. Further, Section 9 of the Act prohibited the second trimester abortion technique of saline amniocentesis. Finally, Section 10 established elaborate reporting requirements, including the recording of each abortion performed after 20 weeks of gestation as a fetal death under the Vital Records Act.

B. The Proceedings In The District Court

Appellant, Eugene F. Diamond, M.D., appeals as an intervening defendant from a declaratory judgment of a three-judge court, declaring unconstitutional the provisions enumerated above. The proceedings in the district court were brought under 42 U.S.C. § 1983 as a class action by four obstetricians and gynecologists who render abortions as part of their practices, and two pregnant women. Appellees sought a declaratory judgment holding the Act unconstitutional, pursuant to 28 U.S.C. § 2201 and 2202, and an injunction restraining the enforcement of the Act, pursuant to 28 U.S.C. §§ 2281 and 2284. The jurisdiction of the court was invoked under 28 U.S.C. § 1343.

Appellees' complaint named the Illinois state officials charged with implementing and enforcing the Act. These officials were the Illinois Attorney General, the Director of the Illinois Department of Public Health and the State's Attorney of Cook County, who was sued in his official capacity and as the representative of the class of all Illinois State's Attorneys.

After the issuance of a temporary restraining order, a three-judge district court was convened. Thereupon, Appellee Diamond petitioned to intervene as a defendant, claiming an interest in the proceeding both as a parent and spouse, as well as a representative of unborn viable or non-viable fetuses or children born alive as a result of a legal abortion. Although Appellant Diamond failed to show that his spouse or daughter was either pregnant or contemplating an abortion, or that the State of Illinois inadequately represented his purported interests, the district court found permissive intervention was appropriate. In a draft order, the district court granted Appellant Diamond leave to intervene "as a parent and for the class of parents affected by the statute," and "as husband and spouse and for the class of husband and spouses affected by the statute," as well as appointing him guardian *ad litem* for viable and non-viable unborn children and for children born alive as a result of legal abortions.

Subsequently, the three-judge court preliminarily enjoined enforcement of the statute. Plaintiff classes of pregnant women and physicians affected by the Act were certified by the district court. In addition, a class of defendant State's Attorneys in Illinois was certified.

Appellees then moved for summary judgment. During the pendency of this motion this Court rendered its decision in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976). In view of *Danforth*, both

Appellant Diamond, and the State's Attorney conceded the unconstitutionality of the parental consent [Section 3(4)] and spousal consent [Section 3(3)] provisions of the Act. (See Appellant Diamond's Jurisdictional Statement App. at 28)[3]

Granting Appellees' motion for summary judgment, the three-judge district court issued a declaratory judgment finding nine other provisions of the Act unconstitutional. It found the definition of criminal abortion and accompanying criminal penalties void for vagueness, failing to adequately define the criminal conduct which was punishable as a Class 2 felony. (App. at 52-57) It found the provisions requiring physicians to inform their patients of the competency of the fetus [Section 3(2)(a)] and the general dangers of abortion [Section 3(2)(b)] unconstitutionally vague and to impose an impermissible burden on the decision of a woman, in consultation with her physician, to have an abortion. (App. at 25-28) It found the automatic termination of parental rights under Section 7 to violate fundamental due process. (App. at 39-43) It found the warning of the termination of parental rights required by Section 8 to be irrational since the warning was to be given only after viability, to women who were not subject to Section 7. (App. at 43) Finally, it found recording of fetal deaths under the Vital Records Act as required by Section 10 to be unconstitutional because the procedure did not protect the confidentiality of the women. (App. at 48-52)

The three-judge court denied Appellees' request for injunctive relief, assuming that Illinois prosecutorial authorities would recognize and abide by its judgment, and granted only Appellees' prayer for declaratory relief. (App. at 60)

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[3] The district court's opinion is attached to Appellant's Jurisdictional Statement and is hereinafter cited at "App. at ..... ."

Both Appellant Diamond and the defendant State's Attorney have filed appeals from this judgment to the United States Court of Appeals for the Seventh Circuit. The defendant State's Attorney, as well as appellant Diamond, has also filed an appeal to this Court, and his Jurisdictional Statement was submitted on August 9, 1978, under the caption and docket number of *Carey, et al. v. Wynn, et al.*, No. 78-229. Appellees have filed no cross appeals in this Court or the Court of Appeals.

II.

ARGUMENT

A. The Appeal Is Not Within The Jurisdiction Of This Court.

Appellant Diamond attempts to invoke the jurisdiction of this Court under 28 U.S.C. § 1253, citing the cases of *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976). However, 28 U.S.C. § 1253 does not authorize a direct appeal from a grant or denial of declaratory relief alone. This Court's decisions in *Roe* and *Planned Parenthood* are inapplicable, since both cases involved appeals from the grant or denial of an injunction against a statute of state-wide applicability.

Rather, the controlling authority is this Court's *per curiam* decision in *Gerstein v. Coe*, 417 U.S. 279 (1974):

> A three-judge District Court entered a declaratory judgment holding unconstitutional a Florida statute, . . . which forbids an abortion without . . . [spousal or parental] consent . . . Because it was anticipated that the State would respect the declaratory judgment, the court declined to issue an injunction against the enforcement of the statute. The State of Florida appeals from the declaratory judgment invalidating the statute. The appeal is dismissed for want of jurisdiction. Title 28 U.S.C. § 1253, under which this appeal is sought to be taken, does not authorize an appeal from the grant or denial of declaratory relief alone. *Gunn v. University Committee*, 399 U.S. 383 (1970); *Mitchell v. Donovan*, 398 U.S. 427 (1970); *Rockefeller v. Catholic Medical Center of Brooklyn & Queens, Inc., Division of St. Mary's Hospital*, 397 U.S. 820 (1970); see also *Roe v. Wade*, 410 U.S. 113, 123 (1973). The declaratory judgment is appealable to the Court of Appeals, and we are informed that an appeal to that court has already been taken.

Indeed, Appellant Diamond recognizes the applicability of *Gerstein*, but urges this Court to ignore its limited jurisdiction on the theory that the State's compliance with the declaratory judgment pending appeal constitutes a *de facto* injunction. Appellees need not dwell on the folly of this suggestion; the disruption of the orderly administration of justice and the relationship between the federal and state governments which would ensue from the recognition of such direct appeals whenever a state does defy a federal district court order is obvious. This is particularly true in this case, since Appellant Diamond does not even have a cognizable interest under Article III of the United States Constitution.

B. Appellant Lacks Standing To Raise The Federal Questions Sought To Be Reviewed.

Litigants seeking judicial review are required by Article III of the Constitution to present a case or controversy by distinguishing their own, personal interest from that of the general public. An intervening party, such as Appellant Diamond, is no exception. He must have a "personal stake in the outcome," *Rizzo v. Goode*, 423 U.S. 362, 372-73 (1976). He "must allege a distinct and palpable injury," *Warth v. Seldin*, 422 U.S. 490, 501 (1975), or that he "has sustained or is immediately in danger of sustaining some direct injury. . . . The injury or threat must be both 'real and immediate,' not 'conjectural and hypothetical.' " *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974). See, also, *Sosna v. Iowa*, 419 U.S. 393, 403 (1975).

Appellant Diamond purportedly prosecutes this appeal "as guardian for unborn children, both viable

and non-viable, and for infants who survive the abortion procedure." (Jurisdictional Statement at 2) His assertion of this representative interest tramples on the case and controversy requirement of Article III, and is totally different from the purported basis of his intervention in the district court.

The only direct interest which conceivably supported Appellant Diamond's intervention in the proceedings below was his potential interest as a spouse or parent. His petition did not allege the existence of any unborn fetus or any infants surviving an abortion which were in his care. His "interest" in viable or non-viable fetuses could, therefore, only be considered to be derivative from and incidental to his interests as a spouse or parent.

Nevertheless, Appellant Diamond has conceded the unconstitutionality of the spousal and parental consent provisions of the Act (Jurisdictional Statement at 14), and his own "direct interest" in the validity of the Act is now moot. Whatever the validity of his initial appointment as a guardian *ad litem*,[4] his prosecution of this appeal

[4] It is highly questionable whether the Federal Rules permit a court to appoint a guardian *ad litem* for an unborn fetus. Fed. R. Civ. P. 17(c) only permits a federal court to appoint a representative for "an infant or incompetent person." The Rule clearly intends that the person be alive since the Advisory Committee notes point out the drafter assumed that the minor or incompetent person may already have a general guardian, conservator or other fiduciary.

This interpretation of the Rule comports with state judicial decisions which emphasize that absent explicit statutory authorization, a court may not appoint a guardian *ad litem* to represent the interests of the unborn. *See, e.g., Mosely v. Title Ins. and Trust Co.*, 154 P.2d 417, 420 (Cal Dist. Ct. App. 1945) *aff'd*, 27 Cal. 2d 457, 315 P.2d 15 (1946); *McPherson v. First & Citizens National Bank*, 240 N.C. 1, 81 S.E. 2d 386 (1954); American Law of Property § 4.87 (Casner ed. 1952). A positive legislative expression is required because only a

(Footnote continued on following page)

on behalf of unborn fetuses simply constitutes an attempt to relitigate this Court's holding in *Roe v. Wade*, 410 U.S. 113, 156-57 (1973), that a fetus is not a person under the Fourteenth Amendment.

While the State of Illinois may have an interest in potential human life, there is nothing in Appellant Diamond's Jurisdictional Statement which suggests that the officials charged with the enforcement of the Act have not or will not adequately represent that State interest. Appellant Diamond has failed to show any personal interest distinct from that of the general public interest in the enforcement of Illinois law. Accordingly, his appeal should be dismissed for lack of standing.

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[4] *continued*
statute can overturn the common law rule that an unborn fetus is not a person. *Mortimore v. Bashore*, 317 Ill. 535, 148 N.E. 317 (1925); Note, Unborn Parties in Property Litigation, 48 Har. L. Rev. 1001 (1935). Illinois adheres to this rule, and the only exception has been strictly limited to the unborn's economic interest.

CONCLUSION

For the foregoing reasons, Appellees respectfully submit that the Court should dismiss this appeal.

Respectfully submitted,

MERLE L. ROYCE, II
One First National Plaza
Chicago, Illinois 60603
(312) 329-5624

R. PETER CAREY
10 South LaSalle Street
Chicago, Illinois 60603
(312) 236-7080

ATTORNEYS FOR APPELLEES, WYNN, BIEZENSKI, ROSNER, CHARLES, ADLER AND ZOE

Of Counsel:

LOIS J. LIPTON
Roger Baldwin Foundation
of ACLU, Inc.
5 South Wabash, Suite 1516
Chicago, Illinois 60603

JEFFREY W. FINKE
One First National Plaza
Chicago, Illinois 60603
(312) 329-5214